United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7405

United States Court of Appeals

FOR THE SECOND CIRCUIT

PAT WRIGHT and JACK LIEBERMAN,

Plaintiffs-Appellants,

—against—

CHIEF OF TRANSIT POLICE, and CHAIRMAN and MEMBERS OF THE BOARD OF THE NEW YORK CITY TRANSIT AUTHORITY,

Defendants-Appellees.

DEFENDANTS-APPELLEES' BRIEF

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Issue Presented

Was the District Court correct when, after a trial, it dismissed the complaint after finding that there were compelling state interests supporting the Transit Authority's rule prohibiting plaintiffs' method of personally selling newspapers in New York City subways?

Statement of the Case

Nature of the Case

Plaintiffs seek a declaratory judgment and permanent injunction purportedly under 42 U.S.C. §1983 and the First Amendment, the effect of which would allow them to utilize their own personal method of selling newspapers throughout New York City subway stations. The plaintiffs are two

individuals who are members of a political group, the Socialist Workers Party. They contend that the defendants' refusal to permit them to sell material in the manner plaintiffs desire deprives them of their civil rights. The defendants are the Chairman and Members of the Board of the New York City Transit Authority ("the Transit Authority") appointed pursuant to New York Public Authorities Law §1201(1), and the Chief of Transit Police, designated pursuant to New York Public Authorities Law §1204(16).

Prior Proceedings

This action was commenced on or about February 21, 1975. On February 24, 1975, plaintiffs moved for a preliminary injunction restraining the defendants from preventing, obstructing or interfering with the sale by plaintiffs of the newspapers "The Militant" and/or "Young Socialist" in New York City subway stations. On April 4, 1975, the District Court, the late Judge WALTER B. BRUCHHAUSEN presiding, denied the motion on the grounds that the Court lacked subject matter jurisdiction, the plaintiffs were not threatened with irreparable injury, and that Transit Authority regulations were reasonable.

Plaintiffs served a notice of appeal on or about April 8, 1975, and sought an injunction against the defendants under Rule 8(a) of the Federal Rules of Appellate Procedure. This application was denied, from the bench, on April 27, 1975 by this Court (MULLIGAN, TIMBERS, HAYS, JJ.)

The initial appeal was argued on November 13, 1975. This Court affirmed the denial of a preliminary injunction but reversed the District Court's holding that it lacked subject matter jurisdiction. The case was remanded for

trial. [*Wright* v. *Chief of Transit Police*, 527 F. 2d 1262 (2d Cir. 1976)] (11a).*

A trial was held on May 13, 1976 before Judge BRUCHHAUSEN. The Court dismissed the complaint, in a memorandum opinion, on July 10, 1976 (133a). Plaintiffs filed a notice of appeal on August 13, 1976.

Status of New York City Transit Authority

The New York City Transit Authority was created by act of the New York State Legislature in 1953. Its powers, duties and functions are set forth in Article 5, Title 9 of the New York Public Authorities Law.

Section 1201 of the Public Authorities Law provides for a board of the New York City Transit Authority and that such board shall be a body corporate and politic constituting a public benefit corporation.

The New York General Corporation Law defines a public benefit corporation in §3, subd. 4 as follows:

> "4. A 'public benefit corporation' is a corporation organized to construct or operate a public improvement wholly or partly within the state, the profits from which enure to the benefit of this or other states, or to the people thereof."

Public Authorities Law, §1202 sets forth the purposes of the Authority. These purposes include the operation of the city-owned transit facilities for the convenience and safety of the public. The statute specifically provides:

> "It is hereby found and declared that such purposes are in all respects for the benefit of the people of the

* Number in parentheses, unless otherwise indicated, refer to the pages of the Appendix on Appeal.

> state of New York and the authority shall be regarded as performing a governmental function in carrying out its corporate purpose and in exercising the powers granted by this title."

The general powers of the Authority are set forth in §1204. They include the right to make, amend and repeal rules for the regulation of the use of the transit facilities under the Authority's jurisdiction "in order to promote the safety of passengers and to protect such facilities." The Authority is specifically authorized by New York state law "To rent space and grant concessions on or in any transit or other facility under its jurisdiction, to fix and collect rentals, fees or other charges therefor". The Authority is also empowered to maintain a transit police department and a uniformed transit police force to preserve the public peace, prevent crime, disperse unlawful or dangerous assemblage and assemblages which obstruct free passage, etc.

The Authority has no taxing power. Its principle source of revenue is from fares paid by passengers using its facilities.

Facts

Plaintiffs' Proof at Trial

At the trial held before the District Court on May 13, 1976, plaintiffs testified that they were prevented from selling the newspapers, "The Militant" and "Young Socialist" in December 1974 by unidentified policemen at the Franklin Avenue IRT station in Brooklyn, and at the 110th Street IRT 7th Avenue line station in Manhattan (31a-32a, 43a-44a). Neither plaintiff identified the policeman who stopped him or her. Plaintiff Pat Wright on cross-examina-

tion stated that she did not know whether the policeman was a city policeman or a transit policeman, nor did she in any way identify the police officer (33a). In any event, no arrest took place; no summons was issued.

Plaintiff Lieberman testified that he had sold his newspapers on the transit system in the past in view of policemen and had not been interfered with (51a).

Both plaintiffs testified that they sell these newspapers for 25¢ a copy; that the cost to them when they buy in bulk from the publisher is 17¢ per copy of "The Militant" and 15¢ per copy of the "Young Socialist" (26a, 50a). They testified that they derive no profits from the sale since all monies they receive they give back to the Socialist Workers Party (25a-26a, 50a-51a).

Plaintiff Lieberman testified that he was not interested in selling newspapers in bulk and plaintiff Pat Wright testified in rebuttal that she could not afford to rent a newspaper stand (107a).

Defendants' Proof at Trial

Defendants' first witness, Andrew Sharetta, an Assistant Civil Engineer employed by the New York City Transit Authority, described the transit system, showing that the subway system is spread out over four of the five counties making up the City of New York. Drawings of the Franklin Avenue station, IRT, and the 110th Street, 7th Avenue line IRT, were introduced in evidence as well as drawings of typical express and local stations on the BMT and IND Divisions (Defendants' Exhibits A, B, C, D, E and F).

The platform widths of local stops are 10 feet wide and on express stops 20 feet wide, except that the area around stairs is much narrower since the stairs take up much of the platform space. He testified that the distance from the

platform to the road bed was four feet and that on the road bed there were two steel rails and an electrified third rail which if touched could kill a person (61a).

The defendants' next witness was Thomas Stanley, an Assistant Station Supervisor employed by the New York City Transit Authority. He testified that there are 460 active subway stations and that each Assistant Station Supervisor covers an area of 25 to 30 stations (71a). He also submitted a report showing that on an average day the subway system carried three and a half million passengers. (Defendants' Exhibit G). He testified that there are rush hours during which a large number of these passengers are carried (72a-73a).

Mr. Stanley stated that there are circumstances in which a station can become overcrowded and which cannot be anticipated by the Authority. He said that while the Authority did try to anticipate crowding due to special events, there are times when fires and other accidents beyond the Authority's control cause backups and crowds to accumulate on station platforms. He testified that he knew of cases of passengers falling to the road bed and being injured (73a). He submitted a report received as Defendants' Exhibit I entitled "New York City Transit Authority Station Department Consolidated Summary of Station Operations Covering 24-Hour Period Ending at 11:59 P.M., Friday, May 7, 1976." The first item in this report indicates a fatality in that a man was found on the southbound track of Pennsylvania Station, IRT. The report also shows injuries to five passengers occurring on stations.

Received as Defendants' Exhibit "H" was the New York City Transit Authority's Annual Report of Rapid Transit Public Incidents for the fiscal year 1974-1975. This report shows (122a) the four most prevalent incidents:

falls on stairways	2,135
falls on platforms	323
falls on mezzanines	123
falls on escalators	173

The defendants' next witness was Peter Cilla, the Authority's Director of Concessions. Mr. Cilla testified that of the 460 active stations on the New York City Transit System only 59 have concession units on them (81a). An inventory of rented concession space was received as Defendants' Exhibit "J". This inventory shows that at the largest stations on the transit system there are at most 13 rented concession spaces. Mr. Cilla testified that in the Port Auhority bus terminal there are over 30 stores and concession areas. He further testified that there were 162 active newspaper stands on the New York City Transit System and submitted as Defendants' Exhibit "K" a tabulation listing the location of these newsstands. They are operated by Ancorp National Services, Inc. under an exclusive contract with the Authority. A letter was received in evidence as Defendants' Exhibit "L" from Ancorp National Services, Inc. dated March 6, 1975, in which Ancorp stated that the newsstands operated by them directly and those operated by their licensees have accepted and will continue to accept newspaper, periodicals, etc. of any political or social content provided these newspaper, periodicals, etc. are not obscene within the meaning of the law. The letter stated, moreover, that "should a person desire a license to operate one of our newsstands, and should there be one available, and should the proper financial terms be agreed upon, no one will be barred, nor to the best of my knowledge has anyone been barred, nor do we now bar any proper business arrangement." (132a).

Mr. Cilla testified that the Authority annually derives $250,000 from its newsstand concessions and a total of seven or eight million dollars from all concessions (81a). He further testified that concessionaires complain when unauthorized peddling goes on, diverting business from them (83a).

Captain Walter Mickulas of the New York City Transit Police Department testified with respect to the patrolling of the New York City Transit System by the transit police force made up of approximately 3,000 men. Schedules showing the deployment of the members of the force on weekdays and Saturdays and Sundays were received in evidence as Defendants' Exhibit "M". These schedules show that on the first platoon some transit patrolmen cover as many as seven stations and on the second and third platoon some transit patrolmen cover as many as six stations. He testified that in the event of an arrest these transit patrolmen double up and it may be that the patrolmen would cover more than the stations enumerated on the schedule. The captain testified that other groups are seeking permission similar to that sought by the plaintiffs here. He stated that the sale of newspapers in the manner in which plaintiffs propose, i.e., walking about a station platform holding the newspaper up and engaging in a sales talk, could interfere with the flow of passenger traffic (94a).

Captain Mickulas also testified that he was familiar with the policing of the Port Authority Bus Terminal on 8th Avenue between West 40th and West 41st Streets, Manhattan; that the Port Authority police regularly patrol that terminal and have for their use closed-circuit TV. He testified that there is no closed-circuit TV coverage on the New York subway system (94a-95a).

Frederick D. Wilkinson, Jr., Executive Officer for Passenger Services of the New York City Transit Authority,

testified for the defendants. He described the reasons why the Authority would not grant permission to the plaintiffs, or anyone else for that matter, to peddle newspapers on the subway. He stressed that the Authority's regulations are designed for the safety and comfort of passengers (99a). As part of his testimony, he pointed out that a party entering the transit system pays his fare which entitles him to an unmolested ride on the subway system. He described intervals between trains as generally two minutes. He said that only in the late evening hours may the headway be 30 minutes, and that subway stations are not designed to be waiting rooms as found in the Port Authority Bus Terminal and in railroad terminals (100a).

Statutes and Regulations Involved

New York Penal Law § 240.35(7) provides in pertinent part:

> "240.35 Loitering
>
> A person is guilty of loitering when he:
>
> * * *
>
> (7) Loiters or remains in any transportation facility, unless specifically authorized to do so, for the purpose of soliciting or engaging in any business, trade or commercial transactions involving the sale of merchandise or services. . ."

New York Public Authorities Law § 1204(5-a) provides that one of the general powers of the New York City Transit Authority is:

> "5-a. To make, amend and repeal rules for the regulation of the use of the transit facilities under its jurisdiction in order to promote the safety of pas-

sengers and to protect such physical facilities. Violations of such rules shall be an offense punishable by a fine of not exceeding twenty-five dollars or by imprisonment for not longer than ten days, or both."

21 New York Codes, Rules and Regulations § 1051 provides in pertinent part:

"1051.9 Photographs, peddling, etc. (a) No person shall in any transit facility or upon any part of the New York City transit system, exhibit, sell, or offer for sale, hire or lease or let out any object or merchandise, or anything whatsoever, whether corporeal or incorporeal."

21 New York Codes, Rules and Regulations § 1050.2 provides in pertinent part:

"1050.2 Construction. In the interpretation of these rules of the New York City Transit Authority, their provisions shall be construed as follows:

* * *

(e) Any act otherwise prohibited by these rules shall be lawful if performed under, by virtue of and strictly in compliance with the provisions of an agreement, permit or license issued or approved by the authority and to the extent authorized thereby.

(f) These rules are in addition to and supplement all municipal, State and Federal laws and ordinances.

ARGUMENT

I.

The Plaintiffs Failed to Demonstrate Facts Sufficient to Prove a Cause of Action Under 42 U.S.C. § 1983.

The proof presented by the plaintiffs at trial falls far short of demonstrating that the defendants have subjected the plaintiffs or caused the plaintiffs to be subjected to the deprivation of any of their civil rights. 42 U.S.C. § 1983. The plaintiffs did not identify the policemen whom they claim prevented them from selling their newspapers on the subway as being members of the transit police force. Plaintiff Wright testified that she didn't know whether the policeman whom she alleges stopped her from selling her newspapers was a City policeman or a Transit policeman (33a). Plaintiffs failed to demonstrate that they were not blocking passenger traffic or otherwise endangering others when the unidentified policeman stopped them. Had they been so interfering with passengers it would have been a proper police function to protect the interests of the passengers no matter what other activities plaintiffs were engaged in. It is presumed that public officials act properly and in accordance with law. E.g. *N.L.R.B.* v. *Bibb Mfg. Co.*, 188 F.2d 825 (5th Cir. 1951); *Donaldson* v. *U.S.*, 264 F.2d 804 (6th Cir. 1959).

Plaintiffs did not apply for authorization to sell their newspapers as provided for in the Penal Law § 240.35(7) or in Transit Authority regulation § 1050.2(3). When Transit Authority regulations in § 1051.9(a) are read together with the regulations in § 1050.2(3) it is clear that the Authority's regulations do not mandate an absolute ban on the sale of plaintiffs' newspapers. The Authority's

regulations merely supplement the State law. Even plaintiffs now concede that they can sell only "subject to reasonable regulations as to specific time, manner and place of selling within the [subway] stations."

The plaintiffs appear to rely upon the interchange of letters between attorneys as the basis for claiming a deprivation of civil rights. A letter dated January 28, 1975 from plaintiffs' counsel requested that the transit police officers be instructed not to interfere with certain unnamed persons described as "our clients" when they sell their newspapers in the subway (111a). The reply of John G. de Roos, then General Counsel of the Authority, dated February 13, 1975, only objects to the manner of the proposed sale. He said:

> "The sale of 'The Militant' in the manner you propose is prohibited by Transit Authority regulations. (21 NYCRR Part 1051.) Due to the confined space in the subways, a free flow of passenger traffic must be maintained in order to secure the safety of our riders. Your proposed method of sale would interfere substantially with this traffic flow, and thereby create hazardous conditions for subway riders." (113a)

It must be remembered that the Authority's power to adopt such regulations is limited to "promote the safety of passengers and to protect . . . facilities." Clearly, the act of adopting this regulation which supplements existing State law or the failure to repeal it cannot of itself constitute a deprivation of civil rights.

It is basic that the trial court's findings of fact, i.e. that compelling state interests exist supporting the Authority's rule, must be sustained unless "clearly erroneous." Fed. R. Civ. P., 52 (a). The plaintiffs' attempt to circumvent

the "clearly erroneous" standard by partial quotations of *Orvis* v. *Higgins*, 180 F. 2d 537, 539 (2d Cir. 1950), *cert. denied*, 340 U.S. 810 (1950) is unavailing. *Orvis* set forth rules for the Court of Appeals to follow in applying the "clearly erroneous" standard. The Court (FRANK, J.) stated "[w]here the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge's finding and substitute our own. . . "[*b*]*ut where the evidence supporting his finding as to any fact issue is entirely oral testimony, we may disturb that finding only in the most unusual circumstances*" *Id.* at 539-40 (emphasis supplied).

Here, for example, plaintiff Lieberman offered his own oral testimony as to the characteristics of the subway system (39a-40a). The District Court ruled that it would "weigh the testimony on both sides" (40a) and, as a party-witness, Mr. Lieberman's credibility was certainly in issue; the "clearly erroneous" rule "applies whether or not there were conflicts in the testimony which the lower court resolved." *Jackson* v. *United States*, 353 F. 2d 862, 865 (D.C. Cir. 1965). The defendants introduced their own evidence relative to the characteristics of the subway system and "a choice between two permissible views of the weight of the evidence is not 'clearly erroneous'" *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 342 (1949).

II.

The New York City Subway System, Being Singular in Nature, the Requirements of Public Safety Constitute a Compelling State Interest Sufficient to Proscribe Plaintiffs' Proposed Activities.

The Legislature of the State of New York has charged the defendants with the obligation to, *inter alia*, operate the transit facilities owned by the City of New York "for the convenience and safety of the public". New York Public Authorities Law §1202(1). The proof adduced at the trial demonstrates that the subway system is singular in nature, serving three and one-half million persons daily, with trains arriving only minutes apart during certain hours. Platform areas vary from ten to twenty feet in width, with a four-foot drop to the roadbed. The defendants make efforts to prepare for crowded and emergency conditions, but not all can be anticipated (73a). In addition, the sprawling 460-station system makes impossible the adequate enforcement of the "reasonable rules and regulations" plaintiffs desire to govern their activities. The Transit Authority could not, as a practical matter, enforce such regulations with sufficient personnel (71a, 82a, 92a-93a). The plaintiffs blithely ignore this, asserting that the mere adoption of regulations reasonable to them would be sufficient, without the need for supervision (brief, p. 19).

The fact is that the mere adoption of regulations, without any possibility of adequate supervision, is counter to the defendants' statutory obligation to operate the system consistent with the public safety.

Under the law of the State of New York it is not sufficient that a railroad carrier simply adopt rules for

passenger safety; it must provide adequate supervision. For example, in *King* v. *Interborough Rapid Transit Co.*, 233 N.Y. 330 (1922), Judge POUND ruled that "[d]efendant was bound to exercise reasonable care to prevent the violation of rules intended for the safety of passengers. It could not rely on moral suasion merely." *Id.* at 332. He further said that "rules are not self-enforcing; they serve only to indicate the danger, not to obviate it. To suggest that no further care was needed, implies the existence of a respect for law and a readiness to obey rules made for the safety of others which general experience does not encounter." *Id.* at 333. It is well-established law in New York that inadequate supervision of fellow passengers can render a carrier liable. Cf. *Finn* v. *Pennsylvania R.R. Co.*, 6 AD 2d 813 (2nd Dept., 1958).

Plaintiffs' primary reliance upon two decision of this Court, *Wolin* v. *Port of New York Authority*, 392 F. 2d 83 (2nd Cir. 1968), *cert. denied*, 393 U.S. 940 (1968) and *Albany Welfare Rights Organization* v. *Wyman*, 493 F. 2d 1319 (2nd Cir. 1974) *cert. denied*, 419 U.S. 838 (1974)[1] only more clearly points up the compelling state interest in prohibiting, on the grounds of safety, the plaintiffs' proposed activities

The bus terminal in *Wolin* bears no resemblance to the rapid transit railroad under the jurisdiction of the defendants. The bus terminal occupies a single city block, similar to a "shopping mall." This single, fixed location, with a full-time police presence, a manager's office, liquor bars, sit-down restaurants, a bowling alley, legal-betting parlors, approximately thirty stores in all (85a-86a), can-

[1] This latter case was cited by this Court on the prior appeal of this matter. 527 F. 2d 1262, 1264. In *Wyman*, no compelling state interest was present to justify a prohibition on the distribution of literature.

not rationally be compared with the complex operation of a rapid transit railroad system, spread over four counties, with the potential safety hazards presented by uncontrolled peddling and solicitation, and the District Court so found as a fact (137a).

Albany Welfare Rights Organization v. *Wyman, supra,* is even less availing to the plaintiffs. There, the court enjoined welfare officials from enforcing an absolute ban on the distribution of leaflets in a welfare center reception area. The differences between a single reception area and the subway system are too obvious to delineate, as is the compelling state interest in safety.

The defendants' policy is manifestly "unrelated to the suppression of free expression." *U.S.* v. *O'Brien,* 391 U.S. 367, 377 (1968). An outlet, newsstand concessions, is as available to plaintiffs and their associates as it is to all others.[2] The primary function of the rapid transit system is transportation (101a), and "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley* v. *Florida,* 385 U.S. 39 (1966) and "[t]he United States Constitution does not forbid a State to control the use of its own property for its own lawful non-discriminatory purpose." *Id.* at 48.

As the jailhouse grounds in *Adderley,* as well as the military reservation in *Greer* v. *Spock,* —— U.S. ——, 44 U.S.L.W. 4380 (March 24, 1976), provided state interests sufficient to proscribe otherwise permissible First Amendment activity, so too the defendants here are compelled by

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[2] Plaintiffs' computation of the annual rental of a newsstand has no basis in the record (Brief, p. 30, n. 9). Obviously, the cost of a particular outlet would be dependent on numerous factors.

reasons of safety to decline to permit the plaintiffs' proposed activity. Moreover, nothing similar to the subway system's demonstrated safety requirements was present in *Adderley* or *Spock*.

In a recent case, decided after the previous appeal of this matter, *Hudgens* v. *NLRB*, 424 U.S. 507, 520 (1976), the Court ruled:

> "For while a municipality may constitutionally impose reasonable time, place, and manner regulations on the use of its streets and sidewalks for First Amendment purposes, see *Cox* v. *New Hampshire*, 312 U. S. 569; *Poulos* v. *New Hampshire*, 345 U. S. 395, and may even forbid altogether such use of some of its facilities, see *Adderley* v. *Florida*, 385 U. S. 39; what a municipality may *not* do under the First and Fourteenth Amendments is to discriminate in the regulation of expression on the basis of the content of that expression, *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95."

The Transit Authority's regulations are manifestly in full compliance with the Supreme Court's guidelines.

III.

The Transit Authority Properly Derives Revenue from Authorized Use of Its Property for the Sale of Newspapers.

Public Authorities Law §1202 establishes the purpose of the Authority to operate city-owned transit facilities for the convenience and safety of the public and states that in so doing it is performing a governmental function. The New York State Legislature, in order to provide extra revenues to maintain a low rate of fare on the transit system, specifically empowered the Authority to rent space and grant concessions on or in any transit facility under its jurisdiction. (Public Authorities Law §1204, subd. 13).

Mr. Cilla, Director of Concessions of the Authority, testified that the Authority derives substantial revenues from these concessions, which total seven to eight million dollars a year. It is well known that the Transit Authority operates at a substantial deficit. It is subsidized by the State, Federal and Local governments and is a "covered organization" subject to the New York State Emergency Financial Control Law for the City of New York (Chapters 868-870 of the New York Laws for 1975).

Plaintiffs seek to make use of the transit facilities for a commercial enterprise, selling newspapers at a profit which they then donate to a political party. They apparently want to use the Authority's space but do not want to pay for it.

There is a compelling state interest in receiving income from all commercial transactions held on subway property. This source of revenue can be destroyed if plaintiffs, and hence all those who presently sell through the newsstands,

are allowed to peddle their papers independently through the subway stations.

In *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936) where a license tax was imposed on newspapers and magazines with a circulation of over 20,000 copies, a test was proposed which serves as a useful guide. The Court considered whether the tax was "single in kind," and whether it imposed a "serious burden" on free expression, and whether the tax was a "pretense." Two later cases, *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943) and *Follett* v. *McCormick*, 321 U.S. 573 (1944) developed a fourth criterion, whether the tax was imposed directly on the exercise of the right.

The instant case meets these tests. Everyone is prohibited from selling within the subways except as permitted through the contract with the Transit Authority. Newspapers are not singled out here as they were in *Grosjean;* rather, any publication, confectionery, or other article is so regulated. The regulation is clearly not a pretense since it applies uniformly. Indeed, it is economically profitable for the Authority to allow sales through the channels that are established.

Finally, the fact that no serious burden is imposed on First Amendment activities is tied in with the question of whether there is any direct tax on the exercise of the right itself.

There is no license tax in this case at all, "fixed in amount and unrelated to the scope of the activities of petitioners or to their realized revenues" which results in a prior restraint. *Murdock* v. *Pennsylvania, supra* at 113. The press and religious groups are not "free from all financial burdens of government." *Id.* at 112. *City of Corona* v. *Corona Daily Independent*, 252 P. 2d 56 (1953), *cert. de-*

nied 346 U.S. 833 (1953). The Transit Authority may properly require that those who utilize its facilities for non-transportation purposes help defray its maintenance expenses. Cf. *United States Labor Party* v. *Codd*, 527 F.2d 118 (2d Cir. 1975). Hence, the raising of revenue based on the sales or income from publications sold in the subways does not run afoul of any constitutional protections afforded plaintiffs.

It follows, therefore, that the Authority may require plaintiffs, if they desire to sell their publications, to do so through the established newsstands, without infringing on plaintiffs' asserted First Amendment rights.

CONCLUSION

The District Court's judgment dismissing the complaint must be affirmed as the plaintiffs have failed to prove facts sufficient to constitute a cause of action and their proposed activities must be regulated in accordance with the Transit Authority's policy, because of compelling state interests.

November 4, 1976

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